UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

KENWORTH SALES CO. D/B/A
KENWORTH SALES SPOKANE

Case 19-CA-233407

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 751, AFL-CIO

Adam D. Morrison, Esq., for the General Counsel.

Ronald A. Van Wert, Esq. (Etter, McMahon, Lamberson Van Wert & Oreskovick, PC), for the Employer.

Spencer N. Thal, Esq. (International Association of Machinists), for the Charging Party.

DECISION

Statement of the Case

Ariel L. Sotolongo, Administrative Law Judge. At issue in this case is whether Kenworth Sales Co. d/b/a Kenworth Sales Spokane (Respondent or Kenworth) violated Sections 8(a)(1) (5) and 8(d) of the Act by refusing to execute a collective-bargaining agreement that it had allegedly agreed to during negotiations in late 2018 with International Association of Machinists and Aerospace Workers, District Lodge 751, AFL–CIO (Union).

I. Procedural Background

Based on a charge filed by the Union in Case 19–CA–233407 on December 27, 2008, the Regional Director for Region 19 of the Board issued a complaint on March 28, 2018, alleging that Respondent had violated the Act as described above. Thereafter, Respondent filed a timely answer denying the substantive allegations of the complaint. I presided over this case in Spokane, Washington, on June 25, 2019.

II. Jurisdiction and Labor Organization Status

The complaint alleges, and Respondent admits, that at all material times Respondent is a Utah corporation with an office and place of business in Spokane, Washington (the facility), where it is engaged in the business of selling and servicing heavy highway equipment. The complaint further alleges, and Respondent admits, that in conducting the above-described business operations, it has purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Washington. Accordingly, Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

The complaint also alleges, Respondent admits, and I find, that the Union has, at all times material herein, been a labor organization within the meaning of Section 2(5) of the Act.

III. Findings of Fact

A. Background Facts

Most of the facts in this case are not in dispute, and indeed all of the operative and relevant documents in this case were stipulated into the record by the parties (GC Exhs. 2 through 15). Respondent and the Union have had a collective-bargaining relationship for a number of years, with the Union representing a unit of employees primarily composed of service mechanics. The last collective-bargaining agreement between the parties prior to the events at issue herein was in effect from December 1, 2015, to November 30, 2018 (GC Exh. 2).[1] In September, prior to the expiration of the 2015–2018 agreement, the Union provided Respondent with a 60-day notice of its intent to modify (or terminate) the agreement, as provided by Article 22 of the agreement, and noted its wishes to commence negotiations (GC Exh. 3). The parties met to bargain for a new agreement on four (4) separate occasions, on November 13, 14, 29, and 30. The Union's chief negotiator and spokesperson during these bargaining sessions was Steve Warren, a business representative for about 10 years, who had also been the Union's main negotiator in prior negotiations with Kenworth. Ric Petersen, Kenworth's district manager, was Respondent's main negotiator and spokesperson during these meetings, as he had been in prior negotiations with the Union.[2] Warren and Petersen were the only witnesses at the hearing.

B. The November Negotiations

The parties' first bargaining session, as noted above, took place on November 13. Early in this session the Union proffered it initial bargaining proposal to Respondent (GC Exh. 4). In essence, this proposal consisted of a copy of the 2015–2018 agreement with modifications or changes represented by the "crossing out" of the prior language or terms with the desired new language then added in. The vast majority of the language and terms of the prior agreement was left untouched, with the proposed modifications consisting primarily of increases to wages and welfare benefits, consistent with Warren's testimony that those were the Union's main concerns

[1] All dates discussed hereafter shall be in calendar year 2018, unless otherwise specified.

[2] Joining Warren as part of the Union's bargaining team were shop stewards Mike Nettle, Joe Hoerl, and Paul Atkins. Joining Petersen for Respondent's bargaining team were Bob Santis, Ric Green, and Ralph Petersen.

for the new agreement. Although neither Warren nor Petersen testified as to what the parties discussed immediately after the Union proffered its initial proposal, the bargaining notes of both the Union (GC Exh. 10) and Respondent (GC Exh. 11) reflect that the parties discussed the Union's proposal(s) in detail, with Warren discussing the changes proposed in each of the contract's Articles were applicable, and Petersen noting where Respondent may have some disagreements or proposed changes.[3] Respondent proffered its initial counter proposal at 1 p.m. that afternoon (GC Exh. 5). For the most part, Respondent's proposal tracked and referenced the contract's articles, indicating proposed changes in articles 5, 14, 15, 16, and 22 (and their various subsections). Thus, the proposed changes to these articles contained the actual contractual language Respondent wanted next to the article number in question. There were two exceptions that were extraneous and did not reference an article in the contract: item 5, under the heading of "shop stewards," which discussed concerns Respondent had with stewards conducting union business while on work time; and item 15, the last entry in Respondent's proposal, which read as follows:

> 15. Open Shop. Allow those who want to remain in the union and allow those who do not want to. We have had too many applicants turn us down because they do not want to be represented by a union and do not want the retirement plan required by the union.[4]

Notably, according to Warren, no discussion took place about the above-cited "open shop" proposal, other than his saying that the Union was "not interested."[5] At some later point during this session, the Union proffered its second proposal (GC Exh. 6), which in essence incorporated and adopted some of the employer's counter proposals, while modifying some of the Union's earlier proposals.[6] By the end of the day, the parties had reached tentative agreements (or "T/A's") on most of the articles of the proposed new agreement, as reflected by the signatures of Warren and Petersen on each individual article agreed to, as reflected in General Counsel Exhibit 8. Thus, the parties agreed, and signed off, on articles 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, and 21. Not agreed upon at this time were articles 5 (pay rates and classifications), 15 (general provisions), 22 (duration) and, notably, article 1 (union recognition and coverage).

The parties met again on November 14, starting at 10 a.m. At this meeting, Respondent made its second counter proposal, making proposals on articles 5, 15, and 22 (GC Exh. 7). The proposal, on item # 5, also included the same exact "open shop" language described above, although such language, unlike the other proposals, did not reference an article number to which it was assigned. Neither Warren nor Petersen offered any testimony on the details of what occurred at this meeting, other than the fact that Respondent made its counter offer, and that the Union stated it was not interested on the "open shop" proposal. The bargaining notes (GC Exh. 10), however, offer some details as to what occurred at this meeting. In essence, Respondent agreed to the Union's proposals on wages (art. 5.2), and substantially agreed to the union

[3] Notably, one of the arts. that Petersen indicated Respondent was concerned with was art. 1.1, which described the bargaining unit that the Union represented. Thus, according to the Union's bargaining notes, Petersen stated: " . . . on 1.1 we need to have a discussion on that." (GC Exh. 10, p. 2.)

[4] This language will be referred to as the "open shop" proposal.

[5] The bargaining notes likewise reflect little or no discussion about this item at this time.

[6] Although the caption of the Union's proposal indicates that it was presented at "3:30 a.m.," this was a typographical error, according to Warren, as it was submitted in the afternoon on November 13.

proposals on articles 15 and 22, with minor proposed modifications. Regarding item 5, the open shop proposal, Respondent stated that it intended to have an open shop, and the Union stated they were not open to that. The meeting adjourned at 10:25 a.m., unlike the November 13 meeting, which had lasted all day. Although it isn't completely clear, it appears that at this point in time, the only matter of substance still left unresolved was the issue of an "open shop."[7]

The parties met again on November 29, at 10 a.m. Warren began the meeting by informing Kenworth's representatives that the Union had filed an unfair labor practice against Respondent the day before, which those present for Respondent had not yet seen. The charge, admitted into the record as General Counsel Exhibit 17, simply alleges that Respondent had failed to bargain in good faith. Although this charge was later withdrawn, it is significant because it reflects on the mindset of the Union at the time, and additionally exposes what appears to be the divergent views between the parties as to what they had agreed upon—or not agreed upon. Thus, Warren testified that he explained that the charge had been filed because Respondent was engaged in "regressive bargaining" by having agreed to the "union security" provisions in article 2 (i.e., the tentative agreement reflected in GC Exh. 8) while at the same time insisting on an "open shop" proposal.[8] Warren also testified that at this meeting he stated that he had spoken to the attorney for the Union Trust/Pension fund, who had made it clear that the "open shop" proposal was incompatible with the law and the trust fund rules, because you cannot have a "partial labor shop." (GC Exh. 10.) Petersen replied that Respondent also had "legal counsel" as well, apparently meaning that they had a different understanding as to what was legally possible. Warren then told Respondent they needed to withdraw their open shop proposal. Petersen replied that they had to take a look at the (ULP) charge, which had apparently taken them by surprise, and said they would get back to the Union on this. Warren then reminded Petersen that the contract was expiring the next day, and Petersen replied that they would get back to the Union. The meeting then adjourned, having lasted only 6 minutes.

The parties met again on November 30, their final meeting. Petersen began the meeting by stating that they had not received any notification from the NLRB regarding the Union's charge, which the employer had not received and were puzzled about. He stated that there was nothing unlawful about the open shop proposal, and as far as the employer was concerned, if all the employees wanted to remain in the Union that was fine. All they wanted to do, he explained, was to give employees a choice, particularly regarding benefits and pension, because it had been a problem with potential recruits. At some point during this meeting, the exact timing is not clear, Respondent proffered its third counter-proposal (GC Exh. 9), which simply repeated the

[7] The Union's bargaining notes reflect that at the end of the meeting, Warren stated that the Union had a "strike sanction vote at 95%." It is unclear whether this cryptical comment meant that the Union had polled its members and was ready to strike if the issue of the open shop remained unresolved. It should be noted that the collective bargaining agreement in place at the time, which would be expiring on November 30, had a no-strike/no-lockout clause in effect, which meant that a strike could not take place until after November 30.

[8] As discussed below, the problem with this view is that Respondent had never agreed to art.1, which is where the bargaining unit is defined, and agreeing to art. 2 does not preclude the employer from seeking to redefine what the proper bargaining unit would be, which would appear to have been the intent of Respondent in pushing for an "open shop." Indeed, it is notable that in its bargaining proposals, Respondent never attached a corresponding art. number to its open shop proposals, unlike all its other proposals, because—as credibly testified by Petersen—it did not intend this proposal to be contractual language, but rather a concept to be further bargained about, as discussed below.

same open shop proposal that had been proffered twice earlier, as described above. According to the Union's bargaining notes (GC Exh. 10), the following exchange took place:

> (Petersen): …Then wantd (sic) to address comments about the open shop. This is not something new. It was on the original proposal made on the 13th. It sounded like this was all of the sudden put on the table. It is legal by the way. Also kws (ed. Kenworth) is aware of what our obligations are and are not. It is up to us to accept this. We have always done this. A little about the uion (sic) security, kw has never said we want to get rid of the union. Your membership can remain 100% as far as we are cocenred (sic). We want to offer potential emplyees (sic) the choice. We are opening up a new facility, much larger, we are going to need another 10-15 techs. To date, I talked to wayne about this, we have never received a qualified tech from the union hall. We all no (sic) and lucky for you guys, techs are in high demand. They no (sic) it. They can go whever (sic) they want to. We need the abiity (sic) to attract techs that's why we are asksing (sic) for what we are asking for. I wanted to address these concerns from the last meeting.
>
> (Warren): Thank you for your explanation.
>
> (Petersen): last time it was your turn, your proposal to us was, take the open shop off the table and we would be good. We are not going to take it off the table. Our proposal to you guys is exactly the same. We need the open shosp (sic), we are not traying (sic) to bust the union, need the ability to attract more techs.
>
> (Petersen): By their rules.
>
> (Warren): Maybe a poor choice of words, maybe benefits, I don't want to bad mouth anything. Benefits are a concern to them. We have had conversations with potention (sic) employees, they ask about vacation, wages, what kind of benefits, 401k, or retirement plan. When they are forced into one package, it can deter or make them.
>
> (Warren): "when you [s]ay that, for discussion purpose, they sai[d] they would worry about their package. If they don't want to be a member, would they get a [d[ifferent package."
>
> (Petersen): "I don't want to twist words. All im (sic) saying, do they have a choice? I don't know, I will leave it at that."
>
> (Warren): "so this is your LBF?" (Last Best Offer)
>
> (Petersen): "This is our offer *today*." (emphasis supplied)
>
> (Warren): "We will tell you, we will not accept recommending this conract (sic). We will recommend to reject."

Following this exchange, some of the members of the Union bargaining team, who were shop stewards, spoke up, in essence stating that having an open shop would cause a lot of division and

dissension among the employees, and that it was therefore not a welcome idea. The following exchange then took place between Warren and Petersen:

> (Warren): "Than (sic) you. I just wanted them to give you a statement. Ivve (sic) talked with you boefre (sic). We wanted to have time to talk to the embers (sic) about open shop. Your LBF we will take to members to vote.[9] I would like them to have a chance to review it. (would like to give them to mon or tudesda (sic)."
>
> (Petersen): "That's ok, we've been beyone (sic) the expiration date before. I would hope you would them eough (sic) time to digest. I would hope they would see everything kws is offering."
>
> (Warren): "I will give them everything that has been offered. Our committee will recommend to reject and strike. We will get the information out and set a date."
>
> (Petersen): "That is all we have."

The meeting then adjourned, having lasted about 11 minutes.

Petersen testified that the "open shop" proposal was not a final contractual proposal or actual contractual language being proposed, but rather a concept proposed for further discussion, and if agreement in principle was reached on this concept, then the parties would have proceeded to "hammer out" the actual contractual language to incorporate the open shop concept. This is why, he testified, Respondent never assigned or attached an Article number to this proposal, since Respondent wasn't certain exactly where (or under which article) in the contract it would fit in.[10]

Later in the afternoon of November 30, Warren sent Petersen an email (GC Exh. 12) attaching the "Red Copy," "Final Proposal" for Petersen to review. This document was a copy of the expiring collective-bargaining agreement which incorporated, in red lettering, all of the changes that were being made to the old agreement—ostensibly as agreed upon by the parties,

[9] Thus, it appears that Warren interpreted Respondent's proposal as the "LBF" (last, best, final) offer, despite the fact that Petersen, as reflected in the above exchange, stated that this was Respondent's offer *today*. In that regard, it is notable that Warren testified that when he asked Petersen in this occasion if this was Respondent's last, best, final offer, Petersen did not say anything—but nodded his head. This is contradicted not only by Petersen, who testified that he responded this was their offer *today*, but by the Union's own bargaining notes, quoted above. Accordingly, I do not credit Warren's testimony in this regard, and I credit Petersen's. I thus conclude that Respondent never indicated that this was their last, best, final offer on the open shop proposal.

[10] I credit Petersen's testimony in that regard. Thus the fact that Respondent never meant this to be contractual language appears to be obvious not only by reading the proposal, which in no way could ever be reasonably mistaken for actual contractual language, but by the exchange between Petersen and Warren during the November 30 bargaining session, cited above, in which Petersen clearly expressed uncertainty as to how this proposal would work. Additionally, the fact that Respondent never made reference to an article in the contract when submitting this proposal plainly indicates that Respondent was not certain how this proposal would fit in.

except for article 1.2, a discussed below.[11] Notably, this document included article 1, now subdivided into article 1.1, which represented the old bargaining unit description carried over from the expiring contract, and article 1.2, in red letters, which consisted of Respondent's open shop proposal. The inherent problem with this document, however, is that it does *not* reflect on what the parties agreed to in negotiations. Quite simply, as credibly testified to by Petersen, Respondent *never* agreed to article 1, now appearing as article 1.1, as reflected in General Counsel Exhibit 8, which shows the contractual articles agreed upon by the parties. There is no evidence that Respondent, verbally or otherwise, ever agreed to article 1.1 at some point in the negotiations after the parties had signed off on their Tentative Agreements (GC Exh. 8). In short, this document does not accurately reflect what the parties had agreed upon. Nonetheless, in his email to Petersen attaching the "Red Copy" agreement, Warren states: "Please verify. I will not propose this to the members until you verify this reflects our negotiation proposals and your last best final offer."[12]

Notably, Petersen never responded in writing. Instead, Petersen testified that he left a phone message for Warren saying "this is our offer." It is not exactly clear what Petersen meant by "this," since Respondent, as noted above, had never agreed to include article 1.1 in any proposal. Despite this ambiguous response, and thus the lack of formal verification, Warren proceeded to present the "Red Copy" agreement to the union members for their ratification on December 3.[13] Indeed, during cross-examination Warren admitted that prior to the ratification vote, he explained to the members that the Employer's proposal did not make any sense to him, that the open shop proposal was inconsistent and irreconcilable with the union-security clause, and that the trust fund attorney had informed him that the open shop proposal was illegal and unacceptable. Nonetheless, he told the members that Respondent was "adamant" about having an open shop provision in the contract and that therefore he was putting the matter up for a vote,

[11] All of the changes reflected by the *red lettering* had been tentatively agreed to by the parties—except, notably, art. 1.2, which was the "open shop" proposal proffered by Respondent. Additionally, as discussed below, this document included art. 1.1 in "black" lettering. The problem with this, however, is that Respondent never agreed or "T/A'd" to art. 1.1.

[12] This again misinterprets what Petersen had said in the November 30 meeting. Petersen said this was their offer *today*, and never stated that this was Respondents last, best, final offer.

[13] Indeed, during cross-examination, Warren admitted that the Union never received confirmation from Respondent (Petersen) that the "Red Copy" agreement was correct. (Tr. 92–93.)

explaining that the Union did not recommend the proposed contract's approval.[14] Not surprisingly, in view of the controversial and ambiguous nature of the open shop proposal, the members voted not to ratify the proposed "contract." According to Warren's testimony, under the Union's constitution, when members fail to ratify a proposed contract, the next step is to vote to authorize a strike. According to Warren, however, if the vote to strike is not approved by 2/3 of those voting, the motion to strike fails and the contact is automatically ratified by "default." This is what occurred when the members voted to strike—although the motion passed by a majority of those voting, it did not meet the 2/3 threshold, and thus the contract was deemed as ratified.[15]

By email dated December 3, Warren notified Petersen that the membership had rejected the contract but the strike vote had failed to reach the required 2/3 approval threshold, so the contract was accepted by "default." (GC Exh. 14.) By email dated December 14 (GC Exh. 15), Warren attached a copy of the "final" (ratified) contract (GC Exh. 16), requesting that Respondent sign it. It is undisputed that Respondent has refused to sign the proffered contract.

IV. Analysis

As briefly touched upon in the preamble of this decision, as issue here is whether Respondent violated Section 8(a)(1)(5) and 8(d) of the Act by refusing to execute a collective-bargaining agreement that had been reached in negotiations with the Union. The General Counsel (and Charging Party Union) argue that the there had been a "meeting of the minds" between the parties at the conclusion of their negotiations, and that by refusing to sign the agreed-upon contract, Respondent committed a *Heinz* violation.[16] Respondent, on the other hand, argues that no "meeting of the minds" ever took place because the "open shop" proposal it had floated, which in any event was not its last, best, or final offer, was very ambiguous at best,

[14] At this point, it is necessary to discuss Warren's credibility—or lack thereof. He testified that be believed that Respondent's "open shop" proposal—including the part where it describes Respondent's motivation, i.e., its difficulty in recruiting technicians warry of being part of the Union's trust fund—was "formal contractual language." I find it exceedingly difficult to believe that an experienced negotiator such as Warren, with many collective bargaining agreements under his belt, could reasonably believe that the "open shop" language proffered by Respondent was intended as final, formal contractual language. Accordingly, I find his testimony in that regard to be disingenuous and not credible. Moreover, I note that Warren was plainly evasive when questioned by Respondent's counsel about his understanding of the meaning of Respondent's open shop proposal. When he was read the proposal verbatim—which at best was highly ambiguous as to how it would work—and asked how he interpreted it, Warren repeatedly replied that he interpreted "just how it read," sometimes repeating the actual language of the proposal, as if it were crystal clear. When asked how he interpreted what he had just read, Warren replied "just what is says," or "it means what I am reading right now." (Tr. 93–96.) Such repetitive back and forth between Warren and counsel quickly came to resemble Abbott and Costello's "Who's on First" routine, except that it wasn't funny, and only revealed a lack of candor on Warren's part. Accordingly, I do not credit Warren's testimony, particularly where it conflicts with Petersen's, and conclude he had no reasonable or discernable understanding of what Respondent's open shop proposal meant, or how it would work within the parameters of the agreed-upon union security clause. Then again, he wasn't alone in his lack of understanding of this proposal, because as discussed below, I do not believe *Respondent* (Petersen) clearly knew or understood how its proposal would work within the parameters of the rest of the contract either.

[15] Notably, Warren admitted that he never explained to Respondent the voting protocols under the Union's constitution, nor is there evidence that Respondent was aware of such or had ever been provided with a copy of the Union's constitution.

[16] *H.J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941)

and it never confirmed that the proposal the Union submitted to its members was an accurate representation of what the parties had—or had not—agreed to. For the reasons discussed below, I conclude that Respondent's has the better argument, and that the allegations of the complaint lack merit.

In *Hempstead Park Nursing Home*, 321 NLRB 321, 322–323 (2004), the Board succinctly described the proper analysis in determining whether a *Heinz* violation had taken place. The Board thus stated:

> Pursuant to Section 8(d) of the Act, either party to a collective bargaining agreement is obligated to execute. . . a memorialized version of the agreement if requested to do so by the other party. *H.J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941). However, this obligation arises only after a "meeting of the minds" on *all* substantive issues and material terms has occurred. See *Intermountain Rural Electric Assn.,* 309 NLRB 1189, 1192 (1992). The General Counsel bears the burden of showing that the parties have reached the requisite "meeting of the minds." Id. At 1192.
>
> A "meeting of the minds" in contract law is based on the objective terms of the contract rather than on the parties' subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of the terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous "judged by a reasonable standard." *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), enfd. 626 F.2d 119 (9th Cir. 1980). However, when the terms of a contract are ambiguous, and the parties attached different meanings to the ambiguous terms, a "meeting of the minds" is not established. (footnote omitted).

At the heart of the issue of whether a meeting of the minds took place between Respondent and the Union during their November 2018 negotiations, is the "open shop" proposal proffered by Respondent at the first bargaining session on November 13 and thereafter, including the last bargaining session on November 30. Because the ambiguity—or lack thereof—of the proposal is central to the issue of whether a meeting of the minds took place, it bears repeating here:

> Open Shop. Allow those who want to remain in the union and allow those who do not want to. We have had too many applicants turn us down because they do not want to be represented by a union and do not want the retirement plan required by the union.

In determining whether the language at issue is ambiguous in these circumstances, we cannot look at the language in question in complete isolation, but must also examine the context in which it was submitted, and also examine what discussions, if any, were had by the parties that would have resolved any potential ambiguity. Thus, regarding the context, it is important to note that the open shop proposal submitted by Respondent was untethered to any article in the proposed (or preexisting) contract, unlike all the other proposals that were submitted and eventually agreed to. The reason for this is quite apparent: for good reason, it was uncertain whether such proposal should be part of article 1, which defined the bargaining unit that the Union represented, or under article 2, the "union security" clause(s), which established the obligation of employees represented by the Union to become members. With regard to any

discussions that the parties may have had about what article of the contract the open shop language should be under, or even more importantly, how such language could co-exist with the union-security clauses that the parties agreed to on the first bargaining session, the answer is revealing: No discussions of this nature took place whatsoever. [17]

It is notable than when the parties signed off on their tentative agreements on November 13 (GC Exh. 8), which included most of the articles of the contract, including the union security under article 2, article 1, which defines the recognized bargaining unit, was *not* part of those agreements. Indeed, there is no evidence, testimonial, documentary, or otherwise, that the parties *ever* agreed to any version of article 1. Thus, when the Union sent Respondent (via email) the "Red Copy, Final Proposal" document on November 30 (GC Exh. 13), which included article 1.1, describing the bargaining unit, and article 1.2, the "Open Shop" proposal, for Respondent to "verify" as its last best final offer, it was sending an invalid version of an agreement that had never agreed to by Respondent—who did *not* verify its accuracy, as the Union had requested it do.[18] Nonetheless, this inaccurate and unverified version of an "agreement" was the one that the Union submitted to its members for ratification, a ratification that ostensibly took place by default when the members—who actually rejected the supposed "contract"—did not muster a 2/3 majority to support a strike. Simply put, what the union members voted on was not an agreement that parties had actually reached, but rather they were voting on the Union's own creation or version—which notably included an Article that had never been agreed upon, and an open shop provision in that Article that it admitted was completely irreconcilable with the union security clause (art. 2), and which the Trust fund had advised was unacceptable and illegal.

For this reason alone, no "meeting of the minds" could have ever taken place in these circumstances, and the union members were not free or entitled to ratify an agreement that was never reached. Accordingly, Respondent was not obligated under Section 8(d) to execute the "contract" (GC Exh. 16) tendered by the Union, which did not accurately represent or reflect the tentative agreements (T/A's) reached by the parties. Moreover, even assuming, arguendo, that article 1 had been agreed to by the parties, the "open shop" language reflected by article 1.2 is incomprehensively ambiguous by any reasonable standard, and, in the absence of evidence that the parties discussed and agreed to its meaning and application, such ambiguity would make a "meeting of the minds" objectively impossible. *Hempstead Park*, supra. Thus, how is it possible to objectively and reasonably interpret the meaning and application of the phrase "allow those who want to remain in the union and allow those who do not want to" in light of the union security provisions of the agreed-upon article 2? Does this language reflect deference to the Supreme Court's *Beck*[19] decision and imply a shop where some employees did not have to join

[17] Respondent discussed why it wanted to have an "open shop," explaining that it was having trouble recruiting new technicians uninterested in the Union's allegedly troubled pension fund, and the Union stressed the fact that having an "open shop" would cause dissension and division—but no discussions took place regarding of how the concept of an open shop could coexist with the union security provisions. Indeed, quite the opposite: the Union announced that the Trust fund attorney had informed them that such open shop provision was incompatible with the rest of the contract, and "illegal."

[18] Moreover, as noted above, Respondent had made it clear that their November 30 proffer of the "open shop" proposal was *not* their "last, best, final offer," contrary to the Union's apparently deliberate—and repeated—mischaracterization of such.

[19] *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

the Union but still had to pay their "fair share" portion of dues for contract negotiation, maintenance and enforcement? Highly unlikely, in the face of the rationale offered by Respondent for an open shop—its trouble attracting new recruits opposed to being part of the union pension plan. Does the language imply a hybrid bargaining unit, where some employees were represented by the union and covered by the terms of the agreement, while others in the bargaining unit were not? This is not legally possible, in light of the language describing the bargaining unit (art. 1.1) and the union security provisions under article 2. It would therefore be unreasonable and invalid to conclude that there was an objective understanding by the parties that they were agreeing to something that was not legally feasible—as the union trust attorney had advised the Union. Does the language suggest that employees wishing to be represented by the Union and covered by the contract would be working in the existing facility while new recruits who did not wish to belong to the Union or be covered by the contract would be working in a new and separate facility Respondent was planning to build? Perhaps, but this was never discussed or suggested, and is highly unlikely in view of the broad language under article 1.1 which describes the bargaining unit as *all* technicians working for Kenworth—which would presumably include workers at any additional facility operated by Respondent.

Thus, there is simply no reasonable or objective way of deciphering what the language of Article 1.2 means, or how it can be applied, and Warren's disingenuous testimony that it means "just what it says" is inherently insufficient and invalid, because no one really knew what this meant.[20] Plainly, the Union had no idea what it meant, given that it admitted such language was irreconcilable with the rest of the agreed-upon contract, particularly article 2; union members who were asked to ratify it did not have a clue, in light of the fact that the Union had explicitly told them it did not make any sense; and Respondent, who proffered the language, had only the faintest idea of what it meant—or how it would work.[21] As Petersen credibly testified, the open shop language was a concept or principle to be further discussed, not a final or formal proposal, and assuming that an agreement in principle was reached on this concept, the intent was to hammer out contractual language to make it work. This is the only way to reasonably interpret this language, which on its face clearly did not reflect intended contractual language. This conclusion is not only supported by the extremely informal and unorthodox language of the proposal, but also bolstered by Petersen's repeated message to Warren that this proposal was not Respondent's "last, best, final offer" but rather their offer "today," a message that fell on deaf ears and was simply ignored by Warren. Simply put, there was no impasse on November 30, and therefore no reason to take the matter to a union membership ratification vote, a vote that was nonetheless invalid because the "agreement" voted upon was not what the parties had agreed to.[22]

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[20] In view of this, the argument by the General Counsel that the contract was final and enforceable, and that an arbitrator should interpret what the contract means, makes no sense and is completely without merit. Arbitrators are legally empowered to interpret contracts, but in these circumstances such interpretation is impossible—and thus any decision by an arbitrator about what the parties intended with regard to art. 1.2 would not have involved an "interpretation," but rather invention. Arbitrators may have many strengths, but writing fiction is not one of them.

[21] This uncertainty on Respondent's side is plainly obvious in Peterson's comment to the Union during the November 30 bargaining session: "All im (sic) saying, do they have a choice? I don't know, I will leave it at that." (GC Exh. 10.)

[22] Indeed, it appears that the Union's step of taking a proposal (art. 1.2) that had been rejected by its bargaining committee to a membership vote was unprecedented, since in all prior occasions involving these parties the proposal put before the members for a vote had been fully agreed to by both sides.

In light of the above, I conclude that the parties never had a "meeting of the minds" because (1) Respondent never agreed to the description of the bargaining unit under article 1.1 of the document proffered by the Union—or agreed to include the "open shop" language under article 1.2; and (2) the language of article 1.2 is hopelessly ambiguous and defies any reasonable or objective interpretation, and was never intended as final contractual language.

Accordingly, I conclude that the allegations of the complaint lack merit and should be dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and based on the entire record in this case, I issue the following recommended[23]

ORDER

The complaint is dismissed in its entirety.

Dated Washington, D.C. January 7, 2020

Ariel L. Sotolongo
Administrative Law Judge

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.